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712-392—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 551

CLEO FRANCIS HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 320 F. 2d 459.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1963 (R. 4). A petition for rehearing was denied on August 15, 1963 (R. 5, 6; Pet. App. 7a–12a). By an order dated September 13, 1963, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October 14, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court's cross-examination of petitioner's psychiatrist was improper.

2. Whether the court erred in permitting the introduction of obscene writings other than those which formed the basis of the indictment.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of New Mexico on six counts charging the mailing of postal cards containing libelous matter, in violation of 18 U.S.C. 1718; on one count charging the mailing of a postal card containing obscene language, in violation of 18 U.S.C. 1463; and on one count charging the mailing of an obscene letter, in violation of 18 U.S.C. 1461 (Tr. 4–7). He was sentenced to imprisonment for one year on the libel counts and five years on the obscenity counts, the sentences to run concurrently (Tr. 13). On appeal (Tr. 14) the conviction was affirmed (R. 4).

Evidence adduced at the trial may be summarized as follows:

A very close friendship had developed over a number of years between petitioner and his wife and Mr. and Mrs. Slusser, who had four minor children. Petitioner and his wife took the Slusser children on trips and lavished expensive gifts upon them, particularly upon 13-year old Linda (Tr. 26, 27, 28, 48–49, 78–79). Shortly after Christmas, 1960, the Slussers decided to curtail the relationship (Tr. 28, 48). About March 1, 1961, petitioner became angry when Mrs. Slusser told him he could not take Larry and Linda on a trip to a

church camp. Petitioner said he loved the children as much as Mrs. Slusser, and that he would make Mrs. Slusser sorry of the day she was their mother (Tr. 29). Shortly thereafter petitioner began making numerous annoying telephone calls to Mrs. Slusser, who then decided to obtain an unlisted number (Tr. 29–30). In May 1961, an obscene card contained in an envelope (Gov. Ex. 32) was left at her school for Linda, who took the papers home and gave them to her mother (Tr. 76–78). On June 22, 1961, a postal inspector took from the mails, without delivery to the addressee, the postcard involved in Count 1, a libel count (Gov. Ex. 1; Tr. 16–17, 4).

On July 12, 1961, as Mrs. Slusser was leaving a doctor's office where she had an appointment regarding her pregnancy, petitioner tried to take from her the keys to her pickup truck. Petitioner stated that Mrs. Slusser had ruined his life by taking the children from him. When she remarked that he could not have loved the children or he would not have hurt them, petitioner handed her a letter and stated, "If you think I have done anything yet, what I have done to you. * * * Read this. * * * I had from twenty to twenty-five of these prepared." He also said "If your neighbors stop speaking to you, you will know the reason why" (Tr. 35–36). That evening between 10 and 11 p.m., after Mrs. Slusser, while in the bedroom, heard someone enter the house, she turned on the light and saw petitioner in the dining room. He left without doing or saying anything (Tr. 38, 76).

Shortly after this incident, the Slussers received obscene material in the mail at their home (Tr. 20–23).

Other such material, reproduced on a "Ditto" machine, was found in the mail boxes or at the homes of a number of friends, neighbors and relatives of the Slussers (Tr. 57–71). The dittoed material, though not itself the subject of the indictment, was admitted in evidence, subject to connection, for the purpose of showing a plan or scheme to distribute obscene or libelous literature of the type referred to in the indictment (Tr. 59, 67). Mrs. Slusser testified that the dittoed material was of the same character as the letter shown to her by petitioner in their conversation on July 12, 1961 (Tr. 36). It was also similar to an exhibit which petitioner admitted having prepared on a ditto machine in connection with another matter (Tr. 154–156). Petitioner had access to such a machine at his office (Tr. 145). In its final charge, the court instructed the jury that the dittoed writings were to be considered solely for the purpose of comparing their spelling, phrasing, diction, and general form with the corresponding features of the materials mentioned in the indictment, as an aid to determining whether the author of the former (shown by the evidence to be petitioner) was the same person who wrote and mailed the latter (Tr. 170–171).

Throughout the exhibits there was a tendency for certain words to be misspelled. When a postal inspector dictated to petitioner a paragraph using those words, petitioner in several instances adopted the same misspelling (Tr. 83–86, 133–135; Gov. Exs. 29, 37). After a postal inspector's interview and investigation of petitioner, the Slussers received no further obscene printed matter (Tr. 37).

A psychiatrist who examined petitioner in April, 1962, testified as a defense witness that petitioner was suffering from a mixed-type psychoneurosis. He stated that if petitioner committed the acts charged, he did so as a result of mental illness and while in a disassociative state without knowledge of what he was doing (Tr. 103–104). Petitioner denied having sent the obscene letters and postal cards (Tr. 142). He also denied showing Mrs. Slusser an obscene letter and threatening that she would be sorry for what she had done (Tr. 143).

ARGUMENT

1. There is no merit to the contention that the trial court, in questioning the psychiatrist, invaded the province of the jury by improperly assuming that it was petitioner who had written and mailed the obscene material. No objection was made on that ground at the trial. Indeed, the questions put to the psychiatrist by defense counsel on direct examination, and the psychiatrist's replies to those questions, were themselves based on the assumption that petitioner had committed the acts complained of—an assumption which had to be made in order to develop the issue of insanity (Tr. 103, 104, 111, 112). In that setting, it was entirely proper for the court to adopt the same assumption in its questions to the psychiatrist. Petitioner was in no way deprived of his alternative defense that he had not committed the acts charged; indeed, that defense was made (Tr. 142). Had the jury believed petitioner's testimony, it would have

been authorized, under the court's charge, to acquit him (Tr. 167, 168, 169).

Nor did the court improperly withdraw the insanity defense from the jury. The psychiatrist had testified that he thought petitioner, unconsciously, had a "fine feeling for Mrs. Slusser" and that if petitioner did write the letter it was because he could never admit to himself that he had such thoughts (Tr. 111). The judge noted that people, particularly spurned women, often develop hatreds and asked whether they were all insane. The doctor replied "I am not saying Mr. Hughes is insane but I think a woman would be more likely to express her virulence openly." It was after this response that the court asked the question complained of: "You don't say he is insane but you say he wrote these letters, used a typewriter or mimeograph but he has no recollection of it?" Thereafter defense counsel elicited from the psychiatrist the opinion that petitioner had no control over those actions (Tr. 111–112). The court's question detracted nothing, therefore, from the psychiatrist's previous testimony that if petitioner committed the acts charged, he did so while in a disassociative state and without knowing what he was doing (Tr. 104). Had the jury believed this testimony, it could have acquitted petitioner, under the court's charge, on the ground of insanity (Tr. 169).

2. In its final charge, the court instructed that the dittoed writings, distributed in the neighborhood without going through the mails, should be considered for the limited purpose of comparing their spelling, phraseology, and general form with the corresponding

features of the indictment exhibits, and thereby determining whether the same person was responsible for both (Tr. 170–171). The disputed materials were properly admitted for that purpose. Mrs. Slusser's testimony that petitioner had threatened to defame her to her neighbors tended to prove that it was he who had circulated the dittoed writings. Accordingly, a comparison of those writings with the literature referred to in the indictment was highly relevant in establishing his identity as the author of the latter materials as well.

Petitioner's uninvited nighttime appearance in the Slusser home and Linda's receipt of the obscene card at her school were admissible as part of petitioner's plan and course of conduct to make life miserable for Mrs. Slusser and her children. It is well established that evidence of acts other than those charged may be admitted to show the defendant's intent, course of conduct, or identity as the culprit. *Lisenba* v. *California*, 314 U.S. 219, 227-228; *Roe* v. *United States*, 316 F. 2d 617, 621–622 (C.A. 5), certiorari denied, 368 U.S. 824; *Halfen* v. *United States*, 321 F. 2d 556, 558 (C.A. 5); *Doty* v. *United States*, 261 F. 2d 10, 13 (C.A. 10); *United States* v. *Frascone*, 299 F. 2d 824, 828–829 (C.A. 2), certiorari denied, 370 U.S. 910; *United States* v. *Iaculla*, 226 F. 2d 788, 793 (C.A. 7), certiorari denied, 350 U.S. 966.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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